

**APR 17 2006**

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U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

LEXINGTON INSURANCE COMPANY,  
a Delaware corporation,

Plaintiff - Appellant,

v.

ALLIANZ INSURANCE COMPANY, a  
California corporation,

Defendant - Appellee.

No. 04-56040

D.C. No. CV-04966-DDP

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
Dean D. Pregerson, District Judge, Presiding

Submission Deferred March 7, 2006  
Resubmitted April 13, 2006<sup>\*\*</sup>  
Pasadena, California

Before: HALL, THOMAS, and TALLMAN, Circuit Judges.

Lexington Insurance Company appeals the district court's grant of summary judgment to Allianz Insurance Company on Lexington's equitable contribution

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

claim. We affirm. Because the parties are familiar with the factual and procedural history of the case, we will not recount it here.

Equitable contribution in the insurance context is a proper remedy when “several insurers are obligated to indemnify or defend the same loss or claim, and one insurer has paid more than its share of the loss or defended the action without any participation by the others.” *Fireman’s Fund Ins. Co. v. Maryland Cas. Co.*, 77 Cal.Rptr.2d 296, 303 (Cal. Ct. App. 1998). To establish a claim for equitable contribution three elements must be satisfied: (1) the insurers must share the same level of obligation, (2) on the same risk, (3) as to the same insured. *Id.* at 304 n.4. If any one of these elements is not met, the equitable contribution claim must fail. We disagree with the district court’s conclusion that the two insurers did not share the same level of obligation; however, we affirm summary judgment for Allianz because Lexington and Allianz did not insure the same risk.

#### **A. Level of Obligation**

An insurance policy can be classified as either primary or excess. Primary insurance liability “attaches *immediately* upon the happening of the occurrence that gives rise to liability.” *Fireman’s Fund*, 77 Cal.Rptr.2d at 311 (citation omitted). Conversely, excess insurance is “coverage whereby, *under the terms of the policy*,

liability attaches only after a predetermined amount of primary coverage has been exhausted.” *Id.* (citation omitted).

The starting point for interpreting an insurance contract, as with any contract, is its plain language. There is no dispute that Lexington’s policy is primary. The plain language of Allianz’s policy also suggests that it is primary, and the court below recognized as much. The Allianz policy does not reference another policy that it is excess to, or even that it only provides excess coverage. *See Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co.*, 89 Cal.Rptr.2d 415, 419-20 (Cal. Ct. App. 1999) (finding an insurance policy primary because it “fails to display the indicia of [an excess policy], such as . . . specific identification of the primary coverage policy”). In fact, the Allianz policy contains an excess insurance clause of its own, further indicating that it is a primary policy.

In cases such as this, “[w]hen an insurance policy contains clear and unequivocal provisions, the only reasonable expectation to be found is that afforded by the plain language of the terms in the contract. . . . [R]esort to extrinsic evidence to support a different meaning is not legally permissible.” *Travelers Cas. & Surety Co. v. Employers Ins. of Wausau*, 29 Cal.Rptr.3d 609, 620 (Cal. Ct. App. 2005); *see also Commerce & Industry*, 89 Cal.Rptr.2d at 421 (“extrinsic evidence such as . . . [a] lease agreement cannot constitute proof of intent unexpressed in the

[insurance] policies.”).<sup>1</sup> Therefore, we hold that both the Allianz policy and the Lexington policy provide primary coverage.

## **B. Risk**

California courts separate the risk element of an equitable contribution claim into two distinct concepts: the risk insured and the interest insured. *See Herrick Corp. v. Canadian Ins. Co. of California*, 34 Cal.Rptr.2d 844, 849 (Cal. Ct. App. 1994) (discussing the risk element of equitable contribution and stating the “same injury might underlie each liability, but the legal nature [i.e., interest] of each liability is different.”). Both the Allianz policy and the Lexington policy indisputably cover the same risk—fire damage. However, we hold that the interests insured by each policy are not the same.

“Different persons may have separate insurable interests in the same property, as, for example, . . . a lessor and lessee.” *Alexander v. Security-First Nat. Bank of Los Angeles*, 62 P.2d 735, 737 (Cal. 1936). This is exactly the situation

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<sup>1</sup>Therefore, the district court erred in looking to the lease agreement to support its conclusion that the Allianz policy is excess to the Lexington policy. Additionally, its reliance on *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 119 Cal.Rptr. 449 (Cal. 1975) (in bank), was misplaced. As recognized by the California Court of Appeal, *Rossmoor* was “an action primarily between two insureds on a contract for indemnity between the two.” *Travelers Cas. & Surety Co. v. Am. Equity Ins. Co.*, 113 Cal.Rptr.2d 613, 624 (Cal. Ct. App. 2001) (stating that *Rossmoor* is distinguishable, and thus not controlling, in an action between two insurers) (emphasis added).

we are faced with in the instant case. Allianz's policy insures the owner's interest in the property, an interest in fee, whereas Lexington's policy insures the tenant's interest in the property, a leasehold interest. Lexington's reliance on *Commerce & Industry* to avoid this construction is misplaced, because that case is factually distinguishable. In *Commerce & Industry*, the dispute was between the tenant's insurer and the subtenant's insurer. 89 Cal.Rptr.2d at 417-18. There, each insured had a leasehold interest, whereas in this case one insured has a fee interest and the other has a leasehold interest. Consequently, we hold that the interests insured by the Allianz policy and the Lexington policy are not the same. Because the interests insured are not the same, the risk element of Lexington's equitable contribution claim is not met and we affirm summary judgment for Allianz.

**AFFIRMED.**